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No. 369

In the Supreme Court of the United States

OCTOBER TERM, 1960

ROBERT C. HETHERINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. 1a–7a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1960 (Pet. 8a), and a petition for rehearing was denied on August 1, 1960 (Pet. 10a). The petition for a writ of certiorari was filed on August 30, 1960. The jurisdiction of this Court in invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an affidavit alleging that three months earlier the trial judge and prosecutor had conferred,

ex parte, about unspecified matters relating to the case is, without more, sufficient to establish that the judge has a "personal bias or prejudice" against the defendant and therefore to require the judge to recuse himself under 28 U.S.C. 144.

2. Whether the affidavit was timely filed under 28 U.S.C. 144, where no good cause was shown for failing to file it during the term of court at which the case was originally set for trial and at which pretrial motions were heard.

3. Whether petitioner's subsequent plea of guilty moots the error, if any, in the judge's refusal to recuse himself because of the *ex parte* conference.

4. Whether the district court erred in accepting as voluntary a plea of guilty entered after two weeks of trial with full advice and acquiescence of counsel.

5. Whether a plea of guilty may be withdrawn after sentencing on grounds of which the defendant and his counsel admittedly had full knowledge, but did not raise, prior to sentencing.

STATUTE AND RULE INVOLVED

28 U.S.C. 144:

> *Sec. 144. Bias or prejudice of judge*
>
> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Federal Rules of Criminal Procedure:

> *Rule 32. Sentence and judgment*
>
> * * * * *
>
> (d) *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.
>
> * * * * *

STATEMENT

Petitioner was indicted in the United States District Court for the Northern District of Illinois, Eastern Division, on three counts of willful evasion of income taxes by filing fraudulent returns for the three years 1952–1954, in violation of §§ 145(b) and 7201, respectively, of the Internal Revenue Codes of 1939 and 1954 (R. 10–12). After two weeks of trial before a jury, petitioner withdrew his plea of not guilty and pleaded guilty (R. 208–210). He was

sentenced to concurrent prison terms of a year and a day on each count and fined a total of $10,000 (R. 217). A motion to vacate the sentence and withdraw the guilty plea was denied (R. 233), and the judgment was affirmed by the court of appeals (Pet. 1a–7a). The facts relevant to petitioner's contentions are as follows:

1. Petitioner was indicted on March 12, 1959, and the case, assigned to Judge Julius J. Hoffman, was originally set for hearing on pretrial motions on May 8, 1959, and for trial on May 18, 1959. The hearing and trial dates were thereafter continued from day to day until June 17, 1959, when the court ruled on the pretrial motions (for dismissal, a bill of particulars, and production) and continued the case for trial until the opening day of the following term, September 8, 1959 (R. 1–3, 15).

On August 27, 1959, petitioner filed a motion under 28 U.S.C. 144, *supra*, to require Judge Hoffman to recuse himself for "personal bias and prejudice" and reassign the case to another judge (R. 3, 16). The supporting affidavit (R. 17–20) alleged that on May 18, 1959, without notice to petitioner, Judge Hoffman conferred in chambers with the Assistant United States Attorney and Ralph A. Weber, the Internal Revenue Service agent in charge of the investigation of the case (R. 18); that Agent Weber had with him files and documents relating to the case (R. 18); and that "things and matters relating to the quantum, nature and theory of the Government's proof in this cause were discussed" (R. 18–19). The claim of bias appears in paragraph 9 of the affidavit, which alleges that in other criminal cases tried before him Judge

Hoffman "has exhibited a personal bias for the Government and against the defendant"—citing as an example a recent reversal by the court of appeals—and that, "by the conduct of a conference in chambers" with the prosecutor, Judge Hoffman "has evidenced a personal bias and prejudice against [petitioner], and a personal bias and prejudice in favor of the Government in this cause" (R. 19). The motion was denied on September 8, 1959, and the case proceeded to trial (R. 21, 24).

2. On September 17, petitioner moved for a continuance (R. 112–114, 143–148), later clarified as motion for a mistrial (R. 198–200), on the ground that he was physically unable to continue trial, and the trial was recessed for a hearing on the motion. A report of an examination made by the Mayo Clinic on August 27–31, 1959, less than two weeks before the trial, was offered in evidence (R. 244–245; 119, 145) and petitioner (a practicing doctor) himself testified on his condition (R. 116–143). The motion was denied on the evidence then offered, but without prejudice to a further offer of evidence (R. 148). On September 21, after an intervening day of trial, the motion was renewed and two doctors who had previously been consulted by petitioner testified in his behalf (R. 159–188 (Nelson); 189–197 (Heenahan)). The evidence offered at the two hearings may be summarized as follows:

Petitioner had for about five years had arteriosclerotic cardiovascular disease with angina pectoris symptoms (R. 163), a common heart disease (R. 184)

the progress of which in his case could be classified as "mild" (R. 194–195).[1] Electrocardiograms taken over several years had been about half normal and half abnormal (R. 163), and the most recent one, made during the course of the trial and only a few days before the motion, was normal (R. 166, 169). The report from the Mayo Clinic stated that an electrocardiogram "was within normal limits" and concluded that, "from the standpoint of his cardiac disease and general physical condition", petitioner "was getting along satisfactorily" (R. 245). Petitioner had never been hospitalized for his condition (R. 139) and continued to practice medicine on evenings and weekends during the course of the trial (R. 131).

The evidence going to the probable effect of the emotional strain of the trial on petitioner's condition requires more detailed statement. Petitioner testified that he had had chest pains for five years but they had become worse during the trial and that (R. 119):

> * * * I have tried to come along with this, but I fear if it continues, it can happen to anybody including myself, and a possible coronary infarction with death is certainly a possibility and something I have looked forward to for some time.'

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[1] There was also evidence that petitioner had recently developed emphysema of the lungs (R. 118, 190), but that condition, unrelated to the heart disease, was not relied upon as a basis for the motion. Petitioner also testified to having had four dizzy spells during recent months (R. 117–118), but his attending physician had no opinion as to their cause (R. 167).

He also testified that his life would be "in danger" if the trial were to continue (R. 132). When asked about the relationship of emotional strain or tension to the progress of the disease, he replied that "I can't say" whether they were related and stated that "it is a disease of old age and is a gradually progressive thing" (R. 123). He also testified that participation in the trial had not "disturbed me mentally too much" (R. 138).

Dr. Nelson, petitioner's consulting physician, testified that an "armchair existence" was no longer prescribed for coronary patients (R. 164–165) but that he had advised petitioner to avoid "excesses" of "emotional strain" or of any other sort (R. 168). Asked whether the stress of a protracted trial might "seriously endanger the doctor's life," he replied, "I think you could say it could" (R. 164). Later, when asked the effect of a trial on petitioner's condition, he restated his diagnosis of the disease and said that "beyond that point you deal with statistics" (R. 167–168). Pressed for a personal opinion, he stated that "I believe severe emotional strain can jeopardize anybody's life with this disorder" (R. 169). After a question whether, in light of the more recent electrocardiographs with normal results, petitioner's condition was improving or worsening, the following colloquy occurred (R. 183):

> The WITNESS. I would say there is electrocardiographic improvement. The patient may be dead the next day.

The COURT. That could happen to you and to me too, couldn't it?

The WITNESS. Certainly.

Having replied, "He might," to a question whether petitioner might die suddenly during the course of the trial because of his condition (R. 185), the witness was asked for his judgment of the probabilities based on his personal examination of petitioner, and the following exchange took place (R. 187):

The WITNESS. I think this man could get into serious trouble, perhaps die, due to stress and strain of this trial. I think it is unlikely.

The COURT. You think it is unlikely?

The WITNESS. We are speaking about individual again, and I have to speak statistically.

The COURT. Based on your statistical knowledge, of course, and your clinical experience. But you think it unlikely, is that it? Is that your answer?

The WITNESS. Yes, but could I add that if there is one chance in one hundred that a life is jeopardized, as a medical man—

The COURT. We will leave that to the lawyers, that one chance in a hundred. I don't know about that.

* * * * *

Q. Doctor, when you say it is unlikely, do you mean you are now talking mathematically?—A. Mathematically.

Q. But the danger is there?—A. Yes, sir.

* * * * *

Q. Doctor, may I ask you, do you have an opinion as to whether or not the continuation of this trial will or will not have an adverse

effect on the physical health of Dr. Hetherington? Do you have an opinion at this time as you sit here on the witness stand?—A. The best word I can think of is that it would jeopardize his health.

* * * * *

Q. And in what manner and to what extent would it jeopardize his health, in your opinion?—A. The range would be from mild to death. I am unable to predict.

Q. I am not asking for the possible ranges, but what is your opinion? Will it or will it not seriously jeopardize his health in your opinion?—A. I would say it will seriously jeopardize his health.

The final witness, Dr. Heenahan, a radiologist who had made chest roentgenograms of petitioner, confirmed the diagnosis of arteriosclerosis of the heart but refused to express an opinion as to the effect of the trial on petitioner's condition (R. 197). However, asked whether "worry, stress or strain have any short term effect," he replied: "I don't see as we can establish that particular fact. I mean, that would be purely speculation." (R. 195). He acknowledged that arteriosclerosis is a gradual progressive disease and stated that the rate of acceleration or what causes acceleration "is strictly unknown to us" (R. 195).

After hearing the evidence offered at both hearings, the district court denied the motion for a mistrial (R. 206).

3. On September 22, 1959, on the morning following the denial of the motion for a mistrial, petitioner

moved, through counsel, for leave to withdraw his plea of not guilty and enter a plea of guilty (R. 207). Addressing petitioner, the court explained in detail the nature of the charges and the punishment that could be imposed and, when petitioner replied that he understood the charges and still desired to plead guilty, accepted the plea (R. 207–210). The court immediately went on to question petitioner at length whether any representations or assurances had been made to him by anyone regarding the form or kind of punishment that would be imposed, explaining that if any such representations had been made he would not permit him to plead guilty (R. 210–211). After Government counsel stated, in response to an inquiry, that petitioner had no criminal record, had practiced medicine for thirty years, and was well regarded in the community, the court asked defense counsel and petitioner, in turn, whether they had anything to say. Defense counsel replied that "the defendant stands before you and throws himself on the mercy of the court", and petitioner stated: "Well, I just can't go on with this" (R. 211). The court then ordered a pre-sentence investigation, set the case for sentencing on October 22, and discharged the jury (R. 211–212).

4. On October 22, 1959, at the sentencing hearing, petitioner, given an opportunity to make a statement, stated (R. 7, 213):

> I don't know what I could say except that I am sorry the whole mess occurred. It is probably because of my boy, and I have been upset, and I haven't been careful of my records.

After argument by counsel on the report of the presentencing investigation (R. 213–217), the court imposed a sentence of imprisonment for a year and a day and fines totalling $10,000 (R. 217). The district court denied a stay of execution (R. 217–218), later explaining that he did so because defense counsel had on a number of occasions during the trial represented to him that petitioner had threatened to take his own life (R. 228), and petitioner was remanded to the custody of the marshal (R. 217).

Within minutes of the sentencing, and almost immediately upon his delivery to the marshal, petitioner collapsed (R. 219). The court, on motion, authorized his immediate removal to a hospital (R. 218–223). It was initially reported that the collapse was caused by a heart attack (R. 219), but by the following day it had been learned that that was not the reason.[2] Because of defense counsel's objection that disclosure of the true reason for the collapse would be "slander-

[2] On the morning following the collapse, when defense counsel moved to vacate the sentence, Government counsel attempted to introduce a report from the marshal of a diagnosis given him by the attending physician (R. 231–232). It was made evident that the purpose of the offer was to correct the misimpression of the previous day that petitioner had had a heart attack. Defense counsel objected to the report, however, on the ground that "if it is what I am thinking of, you are bordering on a slanderous remark" (R. 232), and it was never admitted into evidence. While inferences as to possible "slanderous" causes of the collapse can be drawn from the record (see, *e.g.*, R. 228), the only thing important here is that, as the record clearly indicates (from the offer of proof and the grounds of the objection), the collapse was not caused by a heart attack, and thus provides no support for petitioner's claims that his heart condition made him unable to stand trial.

ous" (R. 232), however, the actual cause of the collapse is not disclosed by the record.

5. On the morning following the sentencing, while petitioner was still in critical condition at the hospital (R. 240), defense counsel filed on his behalf a motion to vacate the sentence and to permit withdrawal of the plea of guilty (R. 237–242). The motion was signed by counsel but purported to be based upon communications made to him, at some unspecified time, by petitioner (R. 243). It alleged, in substance, that petitioner had been so physically weakened that he could not endure further trial, that he had been mentally disturbed and believed he could not survive the trial, and that he had pleaded guilty on an "irrational impulse" (R. 237–238). It was also alleged that petitioner had been misled into believing that he would not be sentenced to imprisonment if he pleaded guilty (R. 238–239). The court, after argument (R. 229–233), denied the motion (R. 233).[3]

ARGUMENT

The petition in this case contains numerous innuendos, if not direct allegations, of impropriety and unfairness on the part both of Government counsel and the district judge. While none of petitioner's contentions seems to us of substantial merit, we have considered it appropriate because of their nature to

[3] The court in effect dismissed, on the basis of its prior ruling, a part of the motion (R. 240–242) which sought to reassert the motion for disqualification under 28 U.S.C. 144 (R. 233).

answer them in greater detail than is customary in a brief in opposition.

1. In objecting to the *ex parte* conference had between the trial judge, Government counsel, and the revenue agent, petitioner assumes that if the conference was improper it automatically provided a basis for disqualification of the judge under 28 U.S.C. 144. But the peremptory challenge procedure of § 144 is available only for "personal bias or prejudice", and "personal bias" is not synonymous with error or impropriety. We show below that petitioner has not established even error or impropriety. Our first point, however, is that, whether or not it was "error", the holding of the conference in no way establishes a personal bias or prejudice on the part of the judge for which the extraordinary procedures of § 144 may be invoked.

The affidavit filed by petitioner suggests two quite different inferences of bias or prejudice—namely, (1) that the judge had a pre-existing bias which was "evidenced" by his action in holding the conference, and (2) that the judge became prejudiced as a result of the conference. Neither of those assertions, however, is sufficient on its face to show the kind of *personal* bias or prejudice which the courts have emphasized is the sole province of § 144.[a]

a. The affidavit alleges that "Judge Julius J. Hoffman in other criminal cases tried in his courtroom has

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[a] *Henry* v. *Speer*, 201 Fed. 869, 871 (C.A. 5), cited with approval in *Berger* v. *United States*, 255 U.S. 22, 32; *Price* v. *Johnston*, 125 F. 2d 806, 811-812 (C.A. 9); *Mitchell* v. *United States*, 126 F. 2d 550, 552 (C.A. 10).

exhibited a personal bias for the Government and against the defendant" and that that pre-formed "bias" against defendants—and, ergo, petitioner—was "evidenced" by his action in holding the *ex parte* conference (R. 19). That allegation is, in substance, no more than an assertion that Judge Hoffman has a reputation as a "hard" judge in criminal cases. While it may explain why petitioner wanted to disqualify Judge Hoffman, it plainly does not satisfy the requirements of § 144. It goes to the judge's general attitude or philosophy towards a class of cases, not to his relationship to the particular defendant in this case, and thus is wholly insufficient to establish "personal bias or prejudice".

b. The affidavit was apparently also intended to suggest, though it is nowhere stated, that Judge Hoffman became prejudiced as a result of the conference—presumably on the theory that he may have been exposed to evidence on one side of the case and may as a consequence have formed a prejudgment on the merits of the case. We may question, in the first place, whether § 144 is ever an appropriate vehicle to raise alleged errors or improprieties committed in the course of the judicial proceedings themselves. The statute seems designed primarily to permit challenges for reasons extrinsic to the proceedings (*e.g.*, personal feelings and relationships), and there seems no reason to invoke that extraordinary procedure—the essence of which is the uncontrovertible nature of the affidavit—to complain of alleged errors committed in the course of the proceedings themselves and subject to correction by ordinary

judicial procedures. Even if the procedure is otherwise available, however, it is still necessary that the action complained of reflect personal bias and prejudice and not mere error, and that requirement remains unsatisfied here.

The bare fact that a judge and a prosecutor have conferred does not, by itself, give rise to an "inference of improper scheming against the right of the defendant to a fair and impartial trial." *Craven* v. *United States*, 22 F. 2d 605, 607 (C.A. 1). Cf. *United States* v. *Onan*, 190 F. 2d 1, [illegible] (C.A. 8); *United States* v. *Volpati*, 120 F. Supp. 80, 87 (D.N.J.). To the fact of the conference, the affidavit here adds only the allegation that "matters relating to the quantum, nature and theory of the Government's proof in this cause were discussed" (R. 18-19). That, however, is fully as consistent with a proper conference as with an improper one. It would, for example, be an accurate description of a conference in which Government counsel asked when the judge expected to bring the case to trial and, in response to an inquiry as to the anticipated length of the trial, explained that it was a "net worth" case (theory of proof) in which numerous stock transactions would have to be traced (nature) and a large number of transfer agents called as witnesses to authenticate their records (quantum). Plainly, such a conference would not even be prejudicial to the defendant, much less produce in the judge a personal bias or prejudice against him. There being nothing in the affidavit, accepted at full value, tending to show personal bias and prej-

udice, the affidavit was insufficient on its face and the motion under § 144 was properly denied.[5]

c. It may be noted, finally, that the affidavit of bias and prejudice was not filed within the time required by § 144—namely, "not less than ten days before the beginning of the term at which the proceeding is to be heard" unless "good cause" is shown for a later filing. The case was originally set for hearing on motions on May 8, 1959, and for trial on May 18, 1959. After numerous continuances, the motions were argued and decided on June 17, 1959, and the case finally reset for trial on September 8, 1959, at the beginning of the next term (R. 2–3). The conference complained of was alleged to have occurred on May 18, 1959, while the case was still pending for hearings and trial during the current term. The affidavit of bias and prejudice was not

[5] It is not claimed in petitioner's carefully-drawn affidavit that the merits or weight of the evidence was discussed at the conference, but even from such a claim it would be necessary, to find bias and prejudice, to take still another step and infer that the result of the discussion was to dispose the judge unfavorably towards the defendant. There is a question, indeed, whether even an actual predisposition against the defendant's case on the merits, formed from such an *ex parte* discussion of the evidence, would amount to "personal bias or prejudice" within the meaning of the statute, rather than simply reversible error. The prejudgment would be based, not on personal antagonism against the defendant, but on an appraisal of the evidence, albeit improperly presented to him. That is, the vice lies, not in the lack of dispassion, but in the impropriety and unfairness of the procedure, and it would seem to be more properly dealt with as such—*i.e.*, as a denial of a fair trial rather than as a disqualification of the judge for being personally biased or prejudiced.

filed, however, until August 27, 1959 (R. 3)—*i.e.*, not until after that term had ended and only shortly before the beginning of the next term. As a result, it could not be heard and acted upon until September 8, 1959, the very day on which the case was to and did begin trial.

Since the affidavit was predicated on the conference alleged to have taken place on May 18, 1959, there was obviously "good cause" for not filing it prior to that time. Some thirty days elapsed, however, before the pending motions (for dismissal, a bill of particulars, and production) were heard and before the case was finally set over for trial to the fall term, and no justification has been offered for failing to file the affidavit within that time.[6] Nor is that defect merely formal, for by waiting until the eleventh hour to challenge Judge Hoffman petitioner, if his motion were well-founded, would have caused the very evils that § 144 was designed to avoid. As filed, petition-

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[6] The affidavit does not claim that petitioner's counsel did not promptly learn of the conference having taken place. And since petitioner's asserted knowledge of the matters discussed at the conference could have come only from one of the participants—presumably, the Assistant United States Attorney—the implication is evident that no attempt was made to suppress the conference from petitioner.

Nor does the reliance in the affidavit (R. 19) on the concurring opinion in *Smith v. United States*, 360 U.S. 1, 17–18, decided June 8, 1959, provide "good cause" for the delay in filing the affidavit. That case had nothing to do with disqualifications for bias and prejudice under § 144, and certainly petitioner did not need the concurring opinion there to tell him that an *ex parte* conference, depending upon its nature and the matters discussed, *can* be prejudicial.

er's motion could not be acted upon until the very day that the trial was to begin and, if granted, would have required a continuance until the case could be reassigned. Presumably disqualification of Judge Hoffman at that point for bias and prejudice would also have required the various motions he had previously ruled upon—without challenge, although almost a month after the conference—to be resubmitted to another judge. It is precisely because of such wasteful and delay-causing consequences that untimely protests are foreclosed by § 144. See *Lipscomb* v. *United States*, 33 F. 2d 33, 34 (C.A. 8), and cases cited.

2. As already suggested, the question raised by the allegations in petitioner's affidavit seems to us not one of personal bias and prejudice—the mold into which petitioner, presumably to gain the procedural advantages of § 144, has attempted to force it—but simply one of judicial propriety or reversible error.

Not every *ex parte* communication between judge and prosecutor is *per se* error, and whether it is or not depends on the nature and circumstances of the communication.[1] *E.g.*, *Craven* v. *United States*, 22 F.

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[1] Canon 17 of the Canons of Judicial Ethics does not, as petitioner seems to imply, condemn all *ex parte* communications but only those "designed to influence * * * judicial action" (Pet. 14), and the propriety of the conference thus turns on its purpose.

Nor does the concurring opinion in *Smith* v. *United States*, 360 U.S. 1, 17–18, support petitioner's apparent view that any *ex parte* contact, regardless of its nature, is *per se* reversible error. In that case, three days after Smith's arrest for kidnapping, an F.B.I. agent had a private conference with the judge and discussed in detail both the facts of the case and

2d 600, 607. In this case, however, because of petitioner's own insistence that the matter be treated solely as one of the sufficiency on its face of the affidavit to satisfy the requirements of § 144, what ac-

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Smith's criminal background, including alleged previous acts of armed robbery and arson and convictions for violation of the Dyer Act and escaping from a federal prison (Record, No. 90, Oct. Term, 1958, pp. 207-208, 221-225, 231-232). Later the same day, Smith waived indictment, counsel, and venue and pleaded guilty to an information charging him with kidnapping. The trial judge, after a "stilted and formal colloquy" advising Smith of his rights (360 U.S. at 3), accepted the waivers and the plea, stated that the F.B.I. agent had already "gone over this case with me" (Record, No. 90, Oct. Term, 1958, p. 9) and that he was "really amazed" at Smith's "past criminal activities" (*id.*, p. 7), and immediately imposed a sentence of thirty years (*id.*, p. 9). The concurring opinion in this Court, after noting the private discussion between the judge and the F.B.I. agent "about Smith's background as well as his connection with the kidnapping", concluded that "such a private conference must be deemed presumptively prejudicial where, in violation of Fed. Rules Crim. Proc., 32(c)(1), it was conducted prior to the plea" (360 U.S. at 17-18).

Literally, all the concurring opinion said was that the particular conference was in the nature of a presentence report and therefore violated the express direction of Rule 32(c)(1) that a presentence report not be submitted to the judge until *after* the defendant has pleaded guilty or been found guilty. Even viewing the opinion more broadly, it does not condemn all private conferences but only "*such* a private conference" as the record in that case disclosed—*i.e.*, a discussion of the defendant's participation in the crime and his criminal background. There has been no allegation, much less a showing, that the conference here was of that nature.

The entire proceedings on the motion were as follows (R. 24):

> The COURT. I have looked at the petition, Mr. Calihan. Is there anything you want to say in support of it?
>
> Mr. CALIHAN [defense counsel]. I believe the cases,

tually occurred at the conference has never been made a matter of record. Moreover, for any purpose other than § 144, not even the bare and incomplete allegations of the affidavit are entitled to be taken as true. The affidavit was offered solely for purposes of § 144 and was uncontrovertible for that purpose, so that no opportunity to controvert the allegations was ever afforded the Government.

Nevertheless, but for minor particulars,[9] the Government does not now challenge the truth of the allegations of the affidavit. It is our position, rather, that even accepting the allegations at face value they do not establish impropriety or error.

a. The only allegation of the affidavit even remotely suggesting an impropriety occurring at the conference is the allegation that "things and matters relating to the quantum, nature and theory of the Government's proof in this cause were discussed" (R. 18–19). We have already pointed out that that allegation is entirely consistent with a simple inquiry as to when the judge proposed to bring the case to trial and an explanation, for that purpose, that the proof would be on the "net worth" theory and require calling hun-

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your Honor, particularly Cora *vs.* Hoffman indicate that there isn't much that I can say. The question is whether or not it is sufficient on its face.

The COURT. I think that is right. I am of the opinion that it isn't; therefore, I deny it.

[9] We are informed that the conference took place on May 12 instead of May 18, 1959, and that the papers the revenue agent had with him were unrelated to this case. Neither detail, however, seems significant.

dreds of witnesses to document thousands of alleged transactions. For that reason alone—*i.e.*, since the allegation is as consistent with a nonprejudicial conference as with a prejudicial one—the allegation is inadequate to establish prejudicial error.

However, because of petitioner's innuendos of impropriety, it is appropriate to point out that, even without going outside the record, it is evident that the innocuous explanation of the conference is by far the more likely one and that a meaningful discussion of the merits of the Government's proof within the space of a short conference would, in fact, have been a physical impossibility.

The Government's proof in this case, based on the net worth and expenditures method, was exceptionally complicated and difficult. It required tracing petitioner's transactions in 129 different securities (R. 73), and proof of a wide variety of personal expenditures, often relatively small individually, including such items as expenditures for women's clothing and accessories (R. 149–150), jewelry (R. 51–52), automobiles (R. 81, 96), insurance premiums on a variety of policies (R. 74–76, 79–80, 106), school tuition (R. 99, 101–102, 107), books (R. 111), redecorating and remodelling (R. 77–79, 97), etc. The proof, in short, amounted to reconstructing, from numerous and diverse sources, petitioner's complete financial life for the years involved (R. 65), an undertaking that was expected to require three months of trial to complete (R. 30). So complex was the proof that, as the defense counsel himself asserted (R. 72), a failure to prove even two or three of the

many transactions might prove fatal to the Government's case. In view of the complexity of the proof and the necessity of accounting for each of some hundreds of items to show a net omission from reported income, it was, we submit, physically impossible for a discussion of the "quantum, nature and theory of the Government's proof" (R. 19) in the course of a single conference with the judge to be anything more than a brief indication of the scope of the issues and the numbers and kinds of witnesses to be called and, therefore, of the probable time it would take to try the case. The impossibility within such a brief period of the details of the proof being discussed and their significance appraised is self-evident, but if confirmation is needed it is provided by the confession of defense counsel at the trial—some four months after the conference—that he himself did not yet understand "all the ramifications of these security transactions" and was "scrambling to keep up with things they [his associated tax counsel] have spent several years on" (R. 72). It is hardly to be supposed that the judge could have comprehended and formed an opinion about the same matters in the space of a single brief conference.

While foreclosing the possibility that the merits or details of the Government's proof could have been discussed at the conference, the record also provides an entirely innocent explanation for the conference. On May 18, 1959, the alleged date of the conference, the case was nominally set for trial on May 20. Defense counsel, however, was then engaged in another trial (R. 25), and the end of the term of court was

rapidly approaching. It was almost certain under the circumstances that the case would not be reached for trial that term, but would be, as it in fact was, continued from day to day until the end of the term and then be continued to the fall term (R. 2–3, 25). Because of the nature of the Government's proof, however—involving "thousands" of documents and "hundreds" of witnesses (R. 26) who would have to be subpoenaed from all parts of the country (R. 32, 65–66)—it would have been necessary to begin at once to prepare for trial and subpoena witnesses if there were any chance of the case actually being tried before the fall term.[10] It was of obvious concern to Government counsel, therefore, to know whether the judge had any intention of bringing the case to trial on short notice in the event that defense counsel should happen to be relieved of the trial in which he was then engaged. Thus, even though we are debarred from going outside the record, it may properly be pointed out that the record itself reflects the likely reason for the Assistant United States Attorney's visit to the judge's chambers. And, as noted above, a conference for that purpose—in which the nature of the case, the difficulties of preparation, and the probable length of trial would naturally be explained—is entirely consistent with all the allegations of the affidavit.[11] A conference

[10] Some three weeks of intensive preparation were required before the actual trial in September 1959 (R. 25–26, 32).

[11] Nor can anything sinister be inferred from the presence of Agent Weber at the conference. As the petitioner's affidavit itself states, Weber was in "charge" of the investigation and preparation of the case (R. 18) and was therefore the

of that nature and for that purpose would, in turn, plainly not have been improper or prejudicial.[12]

In summary, while the record does not affirmatively disclose that the conference was limited to an inquiry as to the scheduling of the case, it does, we think, completely negative the possibility that any meaningful, much less prejudicial, discussion of the merits of the case could have taken place. At the same time it suggests an innocent explanation of the conference that is fully consistent with the allegations of the affidavit, thus demonstrating that petitioner's allegations do not show any impropriety on the part either of Government counsel or of the judge.

b. We acknowledge that, even though the conference was, as we believe, entirely proper, it would have been desirable, when a question about it was raised, for the judge and Government counsel to have stated upon the record what in fact occurred at the conference. Petitioner, however, did not ask for such

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person most familiar with the details of the case, how long would be required for trial, and how rapidly the Government could subpoena the necessary witnesses and be ready for trial.

[12] In terms of the Canons of Judicial Ethics relied on by petitioner (Pet. 14) such an inquiry into the judge's planned schedule would not be a communication "designed to influence his judicial action." Arguably, perhaps, it might be said to have been "designed" to induce the judge immediately to announce a continuance to the fall term rather than continue the case from day to day until the end of the term, but the interests of the prosecution and the defense were obviously not adverse on that matter. Defense counsel was then engaged in the trial of another case which lasted past the close of the term (R. 25), and even by the time the case was called in September he claimed still not to have had time adequately to prepare (R. 24–25).

clarification but chose instead to utilize the bare fact that the conference occurred to force Judge Hoffman's disqualification without further inquiry. He stood upon his claim that the only question was the sufficiency of the affidavit under § 144, and, when the judge correctly held that it was insufficient, raised no question whether what in fact occurred at the conference was improper (R. 24). He cannot now, therefore, complain that the record fails to show what happened at the conference.

Nor is that a result, we believe, of a mere pleader's error. Petitioner was represented throughout the proceedings by able lawyers, both criminal and tax specialists, who, as the record shows, left no stone unturned in their defense of petitioner's rights. It can fairly be assumed that they chose to proceed under § 144, not through a misconception, but for good and sufficient reasons, and there are two aspects of the affidavit filed that readily suggest what those reasons might have been:

First is the fact that the affidavit alleges personal information of what matters were discussed at the conference (R. 18–19). That information could have come only from one of the participants, presumably the Assistant United States Attorney. It is inconceivable, we submit, that the Assistant United States Attorney would have told petitioner's counsel that "matters relating to the quantum, nature and theory of the Government's proof" were discussed without stating the purpose of the conference and the nature of the discussion; that petitioner's counsel would have

been satisfied with such a vague statement; or that, if the Assistant United States Attorney had refused to say more, petitioner would not have objected to that suppression of the facts in his affidavit.

Second, petitioner's affidavit, closely read, carefully avoids any direct allegations that what went on at the conference—as distinguished from there being a conference at all—was improper or prejudicial. The main thrust of the affidavit is that Judge Hoffman had demonstrated in other cases a general bias against criminal defendants; the fact of the conference is used simply as "evidence" of that general bias (¶ 9, R. 19). The suggestion that what *occurred* at the conference might have been prejudicial—if suggested at all—is left to innuendo and inference.

From the fact that the affidavit does not allege either that petitioner's counsel were not informed of what occurred at the conference or that what occurred was improper, it can be inferred, we submit, that they were so informed; that they concluded that the propriety of what occurred at the conference could not successfully be directly challenged; and that the generalized statement in the affidavit that "matters relating to the quantum, nature and theory of the Government's proof" were discussed (R. 19) reflects, not the limit of petitioner's knowledge, but simply the strongest statement that could be made within the bounds of literal accuracy. That, in turn, would fully explain why petitioner chose to stand on the contention that the fact of the conference being held, without more, required Judge Hoffman to recuse

himself under § 144, and not to claim that anything prejudicial or improper actually occurred at the conference. He must here stand on that same contention and cannot draw support from the fact that, because he proceeded under § 144, the record fails to disclose what did happen.

3. The court of appeals, in addition to holding that a conference between judge and prosecutor is not enough, by itself, to ground "an inference of improper scheming" (Pet. 7a),[13] went on to hold that, in any event, "the trial court's denial of the motion to reassign the case does not, even if erroneous, raise a jurisdictional question," and that any error was therefore waived by the voluntary plea of guilty. Lumping together all matters which the courts sometimes refer to as questions of "jurisdiction" or "power", petitioner asserts a conflict among the courts of appeals on the question whether a sufficient affidavit of bias and prejudice under § 144 deprives a court of "jurisdiction." While even at that broad level there is, we think, no conflict,[14] it is sufficient to note that

[13] The cited statement is, we think, a clear ruling that the affidavit was insufficient. As Judge Schnackenberg observed in his opinion on denial of rehearing (Pet. 9a), petitioner is in error in claiming that the court of appeals "refused to rule on the sufficiency of the affidavit" (Pet. 13).

[14] *Green* v. *Murphy*, 259 F. 2d 591, 593 (C.A. 3), and *Korer* v. *Hoffman*, 212 F. 2d 211, 212–213 (C.A. 7), hold, with the court below, that an affidavit under § 144, even though legally sufficient, does not operate to deprive the court of jurisdiction. Cf. *Sexton* v. *Barry*, 233 F. 2d 220, 225 (C.A. 6), certiorari denied, 352 U.S. 870, and cases there cited. Petitioner relies for a conflict primarily on *Connelly* v. *United States District Court*, 191 F. 2d 692, 696 (C.A. 9), and *Stringer* v. *United States*, 233 F. 2d 947 (C.A. 9) (Pet. 16–17). In *Connelly*, the

none of the cases relied upon involved the particular question here whether alleged error in denying such a motion survives a subsequent plea of guilty.[15]

Even on the question of the effect of a plea of guilty on a previously-denied affidavit of bias and prejudice, petitioner's argument ignores possible distinctions based on the nature of the underlying allegations of bias. In this case, the very most the affidavit alleges is that the judge may have been exposed to some part of the Government's evidence and that that might influence his conduct of the trial. Even if that were a sufficient ground for disqualification under § 144, we do not understand how that assumed "preview" of the Government's case could possibly have influenced the subsequent proceedings when, four months later, after two weeks of trial and with full advice of counsel, petitioner changed his plea to guilty, thereby admitting the very matters on which the judge was claimed to be predisposed.[16] That is, whether or not a plea of guilty

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court of appeals, finding the affidavit sufficient, issued a writ of prohibition against the trial judge's taking any *further* action in the case, the very remedy prescribed by § 144. There was no question of the status or effect of any action already taken by the judge after the filing of the affidavit. *Stringer* involved a different statute, and the abbreviated opinion relates only scanty facts.

[15] *Carroll* v. *Zerbst*, 76 F. 2d 961 (C.A. 10), said to have dictum on that question (Pet. 17), contains at most whatever negative implication can be found in a holding that a § 144 motion directed against one judge does not affect a guilty plea entered before another.

[16] This case is readily distinguishable from *Smith* v. *United States*, *supra*, note 7, relied on by petitioner (Pet. 16), by the nature of the conference, the assistance of counsel, the deliber-

precludes in all cases (*e.g.*, even in a case where personal antagonism is alleged) any objection to a prior denial of a § 144 motion, it is clear that in this case any error in the denial of the motion could not have been prejudicial to petitioner in the proceedings after his plea of guilty.

4. After about two weeks of trial, petitioner moved for a mistrial on the ground that he was physically unable to continue trial.[17] After receiving a tendered report of the Mayo Clinic and the testimony of petitioner (himself a doctor) and two of his colleagues whom he had previously consulted, the district judge denied the motion (R. 206). The following day, petitioner withdrew his plea of not guilty and entered a plea of guilty, which was duly accepted (R. 207–211). Petitioner contends that the denial of the motion for a mistrial was error and, in effect, coerced him into pleading guilty in order to avoid jeopardizing his health (Pet. 22–23).

a. The medical evidence, we submit, was totally inadequate to require a discontinuance of the trial. It did tend to show that petitioner suffered from arteriosclerotic cardiovascular disease, the most com-

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ateness of the action in pleading guilty, and the time lapse between the conference and the proceedings on the guilty plea.

[17] R. 198–200. Petitioner had earlier phrased his motion as one for a continuance to permit his examination by a Government doctor (R. 112–114, 143–148), but that of course looked towards the same ultimate relief. Petitioner seems to imply some independent error in not requiring a Government examination, but obviously no such examination was required until petitioner made a sufficient showing of his inability to stand trial and the Government undertook to rebut it.

mon of heart diseases (R. 184), and that that disease, even though classified as "mild" in petitioner's case (R. 194–195), could at any time prove fatal. But on the crucial question of the effect of the emotional strain of a trial on petitioner's condition and the likelihood of that strain provoking a fatal attack, the evidence was at best highly speculative and equivocal.

The Mayo report, although reflecting an awareness that the purpose of the examination was to determine petitioner's ability to stand trial, contains no suggestion of disability but, to the contrary, concluded that petitioner "was getting along satisfactorily" (R. 245). Petitioner, offering a self-diagnosis, suggested that a fatal attack as a result of the trial was "certainly a possibility" but disclaimed any knowledge of the effect of emotional strain on the disease (R. 119, 123). Dr. Heenahan, one of the petitioner's own witnesses, went further and affirmatively stated that nothing was known about the relationship of emotional strain to the disease (R. 195).

Petitioner's primary reliance, of necessity, is placed on the testimony of Dr. Nelson. Read as a whole, however (see Statement, *supra,* pp. 7–9), that testimony amounts to no more than an expression of opinion, unsupported by medical analysis or an explanation of causal relationships, that it was possible, though unlikely, that the strain of the trial could provoke a heart attack. While Dr. Nelson did testify that the trial would "seriously jeopardize" petitioner's health, he had previously indicated that he would consider it serious "if there is one chance in one hundred that a life is jeopardized", so even that opinion

reflected only a statistical possibility, admittedly remote, of causing death. Moreover, Dr. Nelson was apparently talking about the possible effect of a "severe emotional strain" (R. 169), and there is no evidence that the trial was a "severe" emotional strain to petitioner. Petitioner himself testified that the trial had not "disturbed [him] mentally too much" (R. 138). Even more significantly, petitioner had continued to practice medicine in the evenings and on the weekends during the trial, hardly the conduct of a man emotionally and physically exhausted by the trial and fearful that the strain will kill him.

There was thus neither a showing that petitioner was undergoing severe emotional strain as a result of the trial nor any objective evidence of the effect of emotional strain upon his heart condition—unless Dr. Nelson's belief that there was a statistically-remote "possibility" of ill effects be considered such evidence. The evidence was perhaps best summed up by defense counsel, who, after hearing the testimony of the doctors, could only say that "I am not convinced from what I have heard here that this *could not be* a fatal situation" (R. 195; emphasis added). The burden, however, was on the defense to show some reasonable probability of serious medical consequences, not on the Government to foreclose every statistical possibility. Unless it is to be declared to be an absolute rule that every heart patient must be excused from criminal prosecution,[18] the evidence here, we

[18] The question, it should be noted, is not one simply of delaying the trial, for the disease is a progressive one. If petitioner could not be tried at the time of this trial, he could never be tried.

submit, was plainly insufficient to require termination of the prosecution. The matter is one for the sound, responsible discretion of the trial judge. In this case Judge Hoffman was fully aware of his responsibility, and the record shows that he discharged it most carefully.

b. To buttress the claim that he was coerced by fear for his health to plead guilty, petitioner seizes upon his statement—made after the guilty plea was accepted and he was asked if he had anything to say—that "Well, I just can't go on with this" (R. 211). Depending upon the speaker's inflection, tone of voice, and demeanor, that of course could reflect any number of things—a weariness with his pose of innocence; the absurdity of continuing a trial the outcome of which was no longer in doubt; the emotional strain on himself and his family; a desire to get the inevitable done and over with; or, indeed, simply a noncommittal shrug of the shoulders. As delivered, it apparently sounded quite unexceptional, for neither judge, prosecutor, nor defense counsel took note of it. Even thirty days later, defense counsel had not yet found the awesome implications they now attribute to the statement (evidence that petitioner pleaded guilty because he feared for his life if the trial continued), for they failed even to mention the incident in their otherwise exhaustive motion to vacate the sentence and allow withdrawal of the guilty plea (R. 237-242).

Moreover, petitioner had himself testified at length on his physical condition only three trial days earlier, and his testimony reveals, not a man oppressed and driven to rash action by a fear of imminent death,

but a man fully accustomed to, and able objectively to appraise, the liabilities to which his heart disease made him subject. Although he considered a fatal attack during the trial as "certainly a possibility", it was something that "can happen to anybody" with his condition and "something I have looked forward to for some time" (R. 119). He was not "too much" disturbed mentally by the trial (R. 138–139) and had not even asked his counsel to tell the court about the possibility of his death, leaving that "entirely up to their discretion" (R. 142). In short, his testimony shows that, although he was aware of death as an ever-present possibility with a heart disease of his kind, he apparently did not view it as a particularly likely occurrence. And if his "fear" of death was not great enough to induce him to give up evening and week-end practice of medicine to minimize the strain, it is difficult to believe that it was so great as to induce him to plead guilty to a crime he did not commit.

Finally, the change of plea came, not as a rash impulse of the moment, but as a deliberate action following weeks of consideration by counsel. On several occasions during the trial, defense counsel had endeavored to obtain a recommendation of probation from the Department of Justice or some indication from the judge of the sentence he would impose in the event of a guilty plea (R. 82–91). The change of plea was made with full advice of counsel (R. 238–239) and was, indeed, tendered by counsel (R. 207). If it was the product, not of a considered judgment that defense was fruitless, but of an irrational impulse prompted by fear of death, defense counsel, one may

suppose, would have been fully aware of it and would not have permitted the plea to be entered without raising a question as to petitioner's responsibility.

5. The plea of guilty was entered on September 22, 1959 (R. 6). On October 22, thirty days later, the court sentenced petitioner to imprisonment for a year and a day (R. 7, 217). Within minutes of the sentencing, petitioner collapsed (*not* from a heart attack, see note 2, *supra*) and was immediately transferred to a hospital (R. 218–223, 240). The following morning, on October 23, defense counsel filed, on behalf of petitioner, a motion to vacate the sentence and permit withdrawal of the plea of guilty (R. 7, 237–243).

The motion represented, in substance, that at the time of the plea petitioner was physically unable to "endure further participation" in the trial, was mentally disturbed, and believed that continuance of the trial would cause his death, and that his plea of guilty "was made upon an irrational impulse caused by his mental disturbance and physical fear" (R. 237–238). It was contended for those reasons that the plea was "coerced and induced by his physical and mental condition" and was not "voluntarily and understandingly made" and that the judgment and sentence should therefore be vacated and petitioner be allowed to withdraw his plea (R. 242).[19]

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[19] The motion also alleged that petitioner had been misled by statements of the judge and the prosecutor into believing that he would not be given a jail sentence if he pleaded guilty. The factual allegations offered in support of the claim, simply excerpts from the record (R. 239), are on their face inadequate to support the claim. The claim is in any event, as Judge

Since, as the motion recites, petitioner had collapsed within minutes after the sentencing and was still in critical condition at the time the motion was filed (R. 240), the motion could be and was signed only by defense counsel (R. 242). Facts alleged to be within petitioner's personal knowledge were attested to have been based "upon communications made to [defense counsel] by the defendant" (R. 243).

a. The motion to withdraw the plea of guilty reflects, we submit, an overt disregard of the Federal Rules of Criminal Procedure. This is not a case of a guilty plea being entered before trial or without assistance of counsel. The plea was entered with full advice and acquiescence of counsel and only after two weeks of trial. Because of the plea a laboriously prepared trial, for which hundreds of subpoenas had been issued, was aborted and the jury discharged. Plainly defense counsel had a heavy obligation to the court to call to its attention any questions of the propriety of the plea before allowing such action to be taken.

Even more significant was the failure to move for withdrawal of the plea at any time during the thirty days that elapsed between the plea and sentencing. Rule 32(d) of the Federal Rules of Criminal Procedure provides:

> (d) *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is

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Hoffman pointed out in denying the motion (R. 229-230), fully refuted by the record (see R. 82-91, 210-214), and will not be further discussed.

> imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

Not only was the motion not filed within the time required by the Rule, but petitioner offers not the slightest reason for the failure to do so. In that respect, indeed, the motion is a most remarkable one, for it expressly *admits* that all the facts alleged as the basis of the motion[20] were communicated to counsel *before* sentencing. That appears in the attestation that the motion is based on facts communicated to counsel by the petitioner (R. 243), combined with the acknowledgment that petitioner had been incommunicado since the sentencing (R. 240).[21] In short, the motion is an overt assertion that Rule 32(d) means nothing and that the defendant may at will wait to see what sentence is imposed and then decide whether to withdraw the plea. In the circumstances, we submit, the district judge would have been fully justified in refusing to consider the motion at all and dismissing it as a flagrant violation of Rule 32(d).

b. Assuming the motion was entitled to be heard on the merits, it was properly denied. Petitioner

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[20] Except, of course, those based on the sentence imposed. See note 19, *supra*.

[21] At the very latest, defense counsel had learned of petitioner's alleged claims of irrationality at least by the time the sentencing hearing commenced. Yet when asked what he had to say, he replied only that petitioner would "throw himself on the mercy of the Court" (R. 213).

objects that no hearing was held on the allegations. The short answer is that none was asked for, either in the motion itself or in the oral argument on the motion (R. 223–233). In any event, there was no need for a hearing. The claims as to petitioner's physical condition were fully explored at the trial and no further offer of proof was made. Similarly, the judge had had a full opportunity, through petitioner's own contemporaneous testimony on his physical condition and state of mind and his demeanor and conduct in pleading guilty, to determine the voluntariness of the plea. The only thing new even suggested by the motion was petitioner's own assertion that he had acted under an "irrational impulse" and that could hardly overcome the force of his contemporaneous action and testimony.

But even if it be assumed that petitioner could somehow prove—in a hearing he did not request—that he had acted pursuant to an irrational impulse, that would still not entitle him to be relieved of the plea. Even if "irrational" at the time of the plea, petitioner presumably became rational at least by the time—sometime before the sentencing—that he realized his own prior irrationality and informed counsel that his plea had been "coerced." Since counsel did not then move to withdraw the plea, one must assume that petitioner instructed him not to do so.[22] That

[22] Petitioner himself, moreover, when asked at the sentencing hearing if he had anything to say, impliedly reaffirmed his plea by saying only that he was "sorry" that it had happened and in no way qualifying the plea (R. 213). As we have noted, his asserted communication to defense counsel that the plea was the product of irrationality was necessarily made, if at all, sometime prior to that.

decision to allow the plea to stand after the "true" facts came to light—persisted in until the time for withdrawal of the plea allowed by the Federal Rules expired—clearly amounted, we submit, to a ratification of the plea and removed whatever defects it may have had at the time it was entered. Not only was no "manifest injustice" shown, but it would have been, we submit, a manifest violation of proper procedures to have allowed the plea to be withdrawn.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

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